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Products Liability
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Unavoidably Unsafe Defense Used In Pre-1981 Blood Products Strict Liability Case

Patin v. Administrators of Tulane Educational Fund, 2004-2040 (La.App. 4 Cir. 6/15/05), ___ So. 2d ___

In 1980, 12-year-old Donald Patin received numerous blood transfusions during heart surgery. Seventeen years later, in 1997, he was diagnosed with Human Immunodeficiency Virus ("HIV"). Alleging both negligence and strict liability claims, he sued multiple health care providers, contending that the blood products used during his 1980 surgery were tainted with HIV. The defendant health care providers won on summary judgment under the "unavoidably unsafe" defense, Patin appealed, and the Fourth Circuit Court of Appeals affirmed judgment.

Strict liability only exists for blood transfusions occurring before 1981. Those claims are subject to the "unavoidably unsafe" defense, which requires analysis of five factors to determine whether a blood product is unavoidably unsafe and therefore not unreasonably dangerous: (1) nonexistence of a scientific test capable of detecting the virus contaminating the blood product at time of injury; (2) great utility of the product; (3) lack of substitute for the product; (4) relatively small risk of disease being transmitted by the product; and, (5) whether the existence of the virus was known at the time.

Contrary to Patin's arguments, the appellate court ruled the "unavoidably unsafe" defense to be valid in Louisiana. The court also disagreed with Patin's argument that the blood supply could have been made safe by eliminating high-risk individuals as blood donors. Because scientists had not yet identified HIV in 1980 and no blood screening test for HIV existed prior to March 1985, the health care providers could not have known the existence of, or detected, HIV in the blood supply provided to Patin in 1980. Consequently, the health care providers succeeded on appeal.

The Louisiana Supreme Court has not affirmatively ruled on the unavoidably unsafe doctrine, although it denied review of an earlier case on the same subject. See our article in the July, 2002 issue for a discussion of the first Fourth Circuit case to recognize the doctrine: 4TH CIR. RECOGNIZES "UNAVOIDABLY UNSAFE" DEFENSE TO STRICT BLOOD PRODUCTS LIABILITY CASE.

- Sarah B. Belter

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Man Asleep In Driver's Seat Of Running Car Found "Operating A Motor Vehicle"

Douglas v. General Motors Corporation ,
2005 WL 1463532 (W.D. La. 6/21/05)

Returning home after having lunch with his son at a restaurant, William Douglas parked his 1997 Cadillac Seville in his carport and either passed out or fell asleep. He remained seated with his foot on the gas in the running vehicle. An engine fire broke out and Douglas subsequently died from smoke inhalation.

Plaintiffs, the decedent's surviving children, filed a wrongful death and survival action under the Louisiana Products Liability Act. The plaintiffs claimed that the engine fire was caused by defects in the Cadillac including a defective fuel hose and a defective firewall between the engine and the passenger compartment. They also alleged that General Motors failed to warn of those defects.

General Motors denied any defects in the vehicle and contended that the decedent was intoxicated and that when he parked the car he continued to rev the engine causing the engine fire to occur. General Motors sought a partial summary judgment holding that the decedent was "operating a motor vehicle" within the meaning of LSA-R.S. 9:2798.4.

LSA-R.S. 9:2798.4 grants immunity from liability for injuries caused by a person who operates a vehicle while intoxicated. Because decedent's "operation of the motor vehicle" was an important element in asserting that it should be granted immunity for this injury, General Motors requested a partial summary judgment on that specific point. Plaintiffs opposed the motion arguing that the decedent was not operating his vehicle at the time of his death because he was sitting in his parked car in his carport at his residence before the vehicle caught on fire.

General Motors contended that the term "operating a motor vehicle" was broad enough to encompass the decedent's actions even if the decedent was asleep or passed out in the vehicle at the time of the engine fire.

Although past jurisprudence had not defined "operating a motor vehicle" under LSA-R.S. 9:2798.4, the court pointed out that Mr. Douglas' physical and operational control of the vehicle before his death was important. Under the court's analysis, this control did not cease simply because the decedent parked his car and fell asleep or because the vehicle was not in motion at the time of his death. Consequently, the court held that, for purposes of this statute, the decedent "was operating" the vehicle at the time of his death and granted General Motors' motion for partial summary judgment.

- Michelle D. Craig

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Court Rejects Expert's Opinion On Causation Of Birth Defect By Glycol Ethers

Babin v. Ecolab, Inc. ,
2005 WL 1629947 (W.D.La. 7/5/05)

Two women who worked together and became pregnant at the same time had babies who developed anencephaly. The women sued Ecolab, Inc., the manufacturer of a floor wax stripper used at their workplace. They claimed that their exposure to the floor wax stripper caused their children's birth defects. In this opinion, Magistrate Judge Wilson granted summary judgment to Ecolab, holding that there was no evidence that Ecolab's product was a likely cause of the babies' anencephaly.

Plaintiffs theorized that glycol ethers in the floor wax stripper caused the birth defects. In support of this position, they submitted the affidavit of Dr. James Dahlgren, a toxicologist. Dr. Dahlgren stated that 1) glycol ethers are a known cause of birth defects; 2) glycol ethers cause birth defects in animals and humans; 3) in humans, glycol ethers cause neural tube defects; 4) plaintiffs were probably exposed to 2-methoxyethanol (2-ME) and/or 2- ethoxyethanol (2-EE); and 5) inhalation of glycol ethers more probably than not caused the injuries in this case.

Magistrate Wilson rejected Dr. Dahlgren's opinion for several reasons. First, Dr. Dahlgren did not know what type of glycol ethers were present in Ecolab's floor wax stripper. Ecolab proved that the two types referred to by Dr. Dahlgren, 2-ME and 2-EE, were different from the glycol ethers contained i n Ecolab's product, would be metabolized differently, and had different toxicological properties. The court noted that, "Even minor deviations in molecular structure can radically change a particular substance's properties and propensities." Therefore, Dr. Dahlgren's mistaken assumption about the type of glycol ethers in the floor wax stripper "substantially undermined" his opinion.

Further, even if it were assumed that the specific type of glycol ether involved was immaterial, Magistrate Wilson found that Dr. Dahlgren's analysis of the available data was scientifically unsound. Citing the 1997 Supreme Court case of *General Electric Co. v. Joiner,* the magistrate stated "'[T]here is simply too great an analytical gap' between the opinion offered by Dr. Dahlgren and the data he proffered to support his opinions." The magistrate went on to discuss in detail the various studies Dr. Dahlgren relied upon in support of his opinion. The magistrate concluded that, in each case, the cited study did not in fact advance the proposition that glycol ethers cause anencephaly.

Ultimately, the magistrate granted Ecolab's motion for summary judgment, holding that, because the studies and reports relied upon by Dr. Dahlgren failed to support the conclusion that the glycol ethers in the floor wax stripper caused anencephaly, plaintiffs had failed to establish that there was a genuine material fact as to causation.

This case illustrates the willingness of federal courts to carefully review an expert's reasoning before accepting expert opinions *carte blanche*. Under the landmark *Daubert* case, a Supreme Court opinion that preceded *General Electric Co. v. Joiner* by several years, an expert's methodology must be scientifically sound. If it is not, his or her opinion should not be submitted to a jury. That principle has been expanded to apply to summary judgment motions: an expert's opinion that is not methodologically sound cannot be used either in support of, or in opposition to, a motion for summary judgment. The magistrate in this case performed a *Daubert* analysis, without ever referring to the *Daubert* opinion, and rejected Dr. Dahlgren's opinion as being without scientific basis.

- Madeleine Fischer

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U.S. 5th Says La. Law Bars 2nd Suit Against Different Parties Re Same Accident

Davis v. Teleflex Inc.,
2005 WL 1527656 (5th Cir. 6/29/05) (not designated for publication)

Michael Davis sustained a serious spinal cord injury when he was ejected from a motorboat operated by Jerome Self as Self made a sudden hard right turn at a speed of about 50 miles per hour. Davis sued Self and the manufacturers of the outboard motor and the boat. He asserted claims in negligence, products liability under maritime law, and products liability under the Louisiana Products Liability Act. About five weeks into the trial, Davis and the defendants settled the case.

A few weeks before dismissing the case, Davis filed another suit against a company called Teleflex. Although the court did not describe the role of Teleflex, it appears that Teleflex may manufacture steering controls for boat engines. Because Davis had already sued a number of other parties for his injuries arising out of the same boating accident, the trial court granted summary judgment to Teleflex, holding that all further claims concerning his boating accident injuries were barred by article 425 of the Louisiana Code of Civil Procedure. In this unpublished opinion, the Fifth

Circuit affirmed.

Article 425 is entitled “Preclusion by Judgment” and states that, “A party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation.” The court rejected Davis’s argument that maritime law, rather than article 425, should have been applied. The court found that “the strict liability principles of general maritime law and Davis’s right to bring this additional lawsuit are completely separate and unrelated issues.”

The court also rejected Davis’s argument that, in settling his first case, he had reserved his rights to sue others. The court found that the reservation was not intended to apply where the plaintiff simply failed to assert a right or claim for damages through oversight or lack of preparation. Since Davis gave no explanation for his delay in bringing suit against Teleflex, other than his lack of preparation in the first suit, the court found that article 425 barred his attempt to sue Teleflex.

The Fifth Circuit’s opinion raises issues related to *res judicata*. *Res judicata* (“the thing adjudged”) bars a second suit against the same defendant arising out of matters that have already been litigated. In Louisiana law, the principles of *res judicata* are set forth in La. R.S. 13:4231, and exceptions to the rule are set forth in La. R.S. 13:4232. One of the exceptions listed in La. R.S. 13:4232 is “ when the judgment reserved the right of the plaintiff to bring another action.” The Fifth Circuit correctly noted that this exception applies only to parties who were prior defendants – not to “a third party that somehow was related to this case but was never made a party to the settlement agreement or the suit….”

According to this ruling, article 425 is broader than *res judicata* and bars not only a second claim against a previous party, but also bars claims against new parties who were not originally sued. It is not at all clear to this writer that Louisiana courts will concur in this reasoning, despite its obvious merit.

This issue frequently arises in the context of long latency occupational disease cases, such as asbestos-related diseases. Unfortunately, because the Fifth Circuit has not designated this opinion for publication, it cannot be cited as precedent and is unlikely to be discussed or explained in future federal or Louisiana court case law.

– *Madeleine Fischer* back to top

Moulding Machine Maker Loses Summary Judgment Attempt To Four-Finger Amputee

Perez v. Michael Weinig, Inc. ,
2005 WL 1630018 (W.D.La. 7/7/05)

Plaintiff Cleto Perez lost four fingers on his left hand when, in an attempt to remove interior debris, he reached into a Weinig high-speed moulding machine after power to the machine had been cut, but while the bottom cutterhead was still coasting. Perez sued Weinig under theories of design defect and failure to warn. In this opinion, Magistrate Judge Hayes of Louisiana’s Western District addressed issues of whether the use of the machine was a reasonably anticipated one, and whether the machine was defectively designed or bore inadequate warnings. Finding that there were issues of material fact, the magistrate recommended that summary judgment be denied.

The case highlights several important issues for product manufacturers. Because Perez sued under the Louisiana Products Liability Act, Perez had to prove as a preliminary matter that his injury occurred during a “reasonably anticipated use” of the moulding machine. The LPLA defines “reasonably anticipated use” as “a use or handling of a product that the product’s manufacturer should reasonably expect of an ordinary person in the same or similar circumstances.” If a plaintiff cannot establish that his use of a product was a “reasonably anticipated use ,” he cannot recover under any of the four substantive theories offered by the LPLA (defect in construction, design, warning, or breach of express warranty).

Weinig, the manufacturer, relied on two earlier Fifth Circuit cases that held that when someone uses a product in violation of express warnings, the product can never be in "reasonably anticipated use." The magistrate acknowledged these precedents, but found that those cases were distinguishable because they involved specific uses for which the products were neither designed nor intended. Here, the manufacturer expected users to clean debris from around the cutterheads. Although the manufacturer warned against cleaning before all moving parts had stopped, the magistrate found that it was not clear that a warning was given that the cutterheads stopped coasting at different times, that the blades were invisible until they came to a standstill, or that a person should wait up to three minutes before cleaning the interior of the machine. Given the fact that other workers had already started working on other parts of the machine in apparent safety when Perez reached into the machine, the magistrate found that there was sufficient evidence that Perez's use of the machine was reasonable.

As to Perez's defective design allegations, Weinig conceded that an alternative design existed that would have made Perez's injury less likely to occur. Specifically, Weinig offered purchasers the option of buying the machine already equipped with mechanical spindle brakes. The spindle brakes would have stopped all of the cutterheads from turning within ten seconds of turning off the power to the machine. Weinig argued that because Perez's employer chose to purchase the cheaper, but less safe, option without the spindle brakes, Perez was precluded from suing on the basis of a design defect, citing *Scallan v. Duriron Co., Inc.*, 11 F.3d 1249 (5th Cir.1994).

In *Scallan,* the Fifth Circuit held that a manufacturer was not liable for a "design defect" where the purchaser knowingly rejected an arguably safer option. The magistrate here found that *Scallan* reflected the state of Louisiana law before the adoption of the LPLA. Because the LPLA did not codify the *Scallan* exception, the magistrate held that under the LPLA manufacturers cannot escape liability for injuries to users simply because a purchaser is willing to buy an unsafe product over an available safer alternative.

On the question of whether Weinig provided an adequate warning, the magistrate found that there were genuine issues of material fact. Weinig did provide warnings on the moulding machine stating that the user should refrain from putting his hand inside the machine until all of its moving parts had stopped. However, plaintiff complained that the warning was not sufficiently specific because none of the warnings posted by Weinig told the user that it could take up to three minutes for the cutterheads to stop after the power was turned off, that the blades were invisible while they were moving, or that different cutterheads took longer to stop than others. The magistrate found that these issues could only be decided at trial and therefore recommended denial of the motion for summary judgment.

– *Madeleine Fischer*

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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